HIPAA Restrictions on Parents' Access to Child's Medical Information

1. HIPAA Privacy Rule – HIPAA allows a parent to have access to the medical records as a minor child's personal representative EXCEPT (1) when state law allows the child to consent to the care without the parent; (2) when there is a court order for the care; or (3) when the parent has agreed to a confidential relationship between the provider and the child. 45 C.F.R. § 164.502(g)(3)(i)(A)-(C).

2. A parent may still have access in these situations if state law requires or permits parental access. However, if the state law is silent on a parent's access, the child's health care provider may decide based on their professional judgment whether to grant parental access to the child's medical information. *Id.* at 164.502(g)(3)(ii)(C).

When Minors In Wyoming Can Consent to Medical Care Without Parental Involvement

Under Wyoming law, children can consent to treatment without parental authorization in the following circumstances. These state laws do not address the parents' right to access the child's medical information.

1. General Consent: Under Wyo. Stat. Ann. § 14-1-101 a minor can consent to treatment under the following circumstances: (1) the minor is legally married; (2) the minor is active duty military; (3) the parents cannot be located and the health care treatment is urgent; (4) the minor lives on his own and provides for himself; (5) the minor is emancipated; or (6) the minor is at least twelve (12) years of age and consents to treatment of a tobacco cessation program approved by the department of health.

2. Sexually Transmitted Disease: Under Wyo. Stat. Ann. § 35-4-131(a), a minor, "may give legal consent for examination and treatment for any sexually transmitted disease infection." The Wyoming Department of Health's (WYDOH) Rules and Regulations mirror this statute and allow minor consent for examination and treatment of STDs. 048-0051-4 Wyo. Code R. § 1.

3. Family Planning: Although it is commonly assumed that minors can consent to treatment related to family planning and birth control, Wyo. Stat. Ann. § 42-5-101 appears to permit such treatment of a minor only through referral from WYDOH. This statute does not create a blanket rule that a minor can consent to contraception health care. Under Federal law, an entity that receives a family planning service grant from HHS is required to provide those services regardless of the patient's age. 42 C.F.R. § 59.5(a)(4).

4. Sexual Assault: A minor who reports a sexual assault can give consent for treatment if (1) the parents cannot be located or (2) the parent or guardian is the suspected perpetrator. Wyo. Stat. Ann. § 6-2-309(e).

5. Reportable Disease or Condition. In addition to these state statutes, WYDOH adopted a regulation which states, "[i]ndividuals under eighteen years of age may give legal consent for examination and treatment for any listed reportable disease or condition, without the consent of parents or guardians." 048-0046-11 Wyo. Code R. § 1. WYDOH's list of reportable diseases or conditions is attached and was last revised May 11, 2023.

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Legal Sidebar

Title X Parental Consent for Contraceptive Services Litigation: Overview and Initial Observations (Part 1 of 2)

February 10, 2023

Enacted in 1970, the Title X Family Planning Program (Title X) is a federal program that provides grants to public and nonprofit agencies to deliver family planning and related preventive health services. The Program directs grantees to furnish such services in a manner that prioritizes low-income individuals, with reduced or no cost to such individuals. At more than 3,000 service sites, Title X projects offer a range of clinical services including pregnancy testing and counseling, contraceptive services and counseling, basic infertility services, breast and cervical cancer screening, services related to sexually transmitted infection (STI), and adolescent-friendly health services. As to adolescent services, for almost four decades, lower courts—including the U.S. Courts of Appeals for the District of Columbia, Second, Eighth, and Tenth Circuits—have uniformly concluded that Title X precludes the imposition of a parental notification or consent requirement, including under relevant state laws. Consistent with this case law, current Department of Health and Human Services (HHS) regulations codified at 42 C.F.R. § 59.10(b) prohibit Title X projects from requiring parental consent and notification for services provided to minors.

In December 2022, however, the U.S. District Court for the Northern District of Texas issued an order in *Deanda v. Becerra*, ruling in favor of a parent who challenged Title X's parental consent and notification prohibition, objecting on religious grounds to his daughters' access to prescription contraception and other family planning services. The district court held that Title X's prohibition infringes upon the plaintiff's statutory right to parental consent under Texas law as well as his fundamental parental right under the U.S. Constitution to direct the upbringing of his children. Based on this conclusion, the court set aside the relevant portion of § 59.10(b). The court's constitutional ruling has potentially broad implications beyond Title X.

This two-part Sidebar series provides an overview of this litigation. Part 1 provides an overview of the relevant legal background. Part 2 provides a summary of the district court's order, as well as certain preliminary observations for Congress's consideration

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Legal Background

State Law on Parental Consent

In the United States, the right of parents and guardians to consent to health care services for their minor children is primarily governed by state law. The default rule that parents have the legal authority to consent on behalf of their children evolved initially through the common law. Over time, however, many states have enacted various statutory exceptions to the default rule. The exceptions vary from state to state but generally fall within two categories: (1) laws that permit certain categories of minors, such as those who are emancipated, married, or above a certain age, to consent to medical services; and (2) laws that permit minors—or minors above a certain age—to consent to certain types of medical services, such as services related to substance abuse, mental health, STIs and other infectious diseases, and contraceptive and other reproductive health services.

Constitutional Dimensions of Parental Consent

As an aspect of parents' broader authority over their children's welfare, parents' right to consent to their children's medical care also has constitutional dimensions. In the early twentieth century, the Supreme Court twice struck down certain state laws as "unreasonably interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control" under the Fourteenth Amendment's Due Process Clause. In *Meyer v. Nebraska*, the Court struck down a state law that prohibited schools from teaching any language other than English to grade school children. In *Pierce v. Society of Sisters*, the Court struck down an Oregon law that required parents and guardians in the state to send children between the ages of eight and sixteen to public schools. About two decades later, however, the Court, in *Prince v. Massachusetts*, upheld a state law that prohibited minors from selling merchandise in the streets. In so holding, and over the objections of the plaintiff parents who wanted their minor children to sell religious literature, the Court recognized that the state "has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."

Over the next few decades, the Supreme Court continued to develop and recognize, in disparate lines of cases, certain fundamental, substantive rights under the Due Process Clause that warrant heightened protection. However, even as the Court reiterated parents' "fundamental liberty interest in the care, custody, and management of their children" as a substantive right in the modern era, the Court has notably avoided articulating a uniform standard that applies to claims alleging an infringement of this right. In *Parham v. J.R.*, for example, the Court upheld a state's voluntary civil commitment procedures that allowed minors to be committed to state psychiatric hospitals by their parents without an adversarial hearing before an impartial tribunal. The Court so concluded after balancing the specific competing interests at issue, including the child's liberty interest, the parents' interest to decide, and the state's interests in the child's welfare and the efficient administration of its mental health facilities.

More recently in *Troxel v. Granville*, the Court, in a plurality opinion, invalidated a state law that authorized state courts to award more visitation to two children's grandparents against the wishes of the sole surviving parent. While a majority of justices agreed that parents have a fundamental right over the care, custody, and management of their children, no majority agreed on whether or to what extent the state law infringed upon such a right, or what standard to apply in such an analysis. In fact, as Justice Clarence Thomas observed in his concurrence, several of the accompanying opinions—including the plurality opinion—"curiously [did not] articulate[] the appropriate standard of review."

As a result of this lack of guidance, lower courts have applied different standards in different circumstances that implicate the parental right in the care, custody, and control of their children. In some cases—for example, those involving certain challenges to a school's mandatory uniform policy or

community service requirement—courts applied rational basis review, the most lenient form of review. In other cases—for example, in several cases involving local juvenile curfew laws—courts applied intermediate or strict scrutiny. In still other instances, including cases involving local health clinics providing contraceptives to minors without parental notification, courts have applied a context-specific balancing test, consistent with the Court's approach in *Parham*. In those cases, the Sixth Circuit and the Third Circuit applied a balancing test that weighed the relevant competing interests, including that of the parent, the minor, and the government, as well as the nature of the government's intrusion, to conclude that the practice did not unconstitutionally infringe upon the parents' rights.

Federal Law on Parental Consent

Layered within the patchwork of state laws allowing unilateral minor consent to varying degrees and the uncertain constitutional scope of the right of parental consent are various federal laws that address the issue through different approaches. Some, like the Health Insurance Portability and Accountability Act (HIPPA) and its implementing regulations, expressly incorporate relevant state laws on minor consent. At least one federal grant program, the Student Support and Academic Enrichment Grants, specifically defines certain parental consent requirements that grant recipients must implement when providing school-based mental-health assessments or services.

Title X's Prohibition on Parental Consent and Notification

Title X, as amended, does not specifically address consent requirements for services funded by the Program. Instead, 42 U.S.C. § 300(a) authorizes the HHS Secretary to "make grants . . . with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." The statute further instructs that "[t]o the extent practical, entities which receive grants or contracts under this subsection shall encourage family participation in projects assisted under this subsection." Congress added this additional instruction in 1981, after amending the statute in 1978 to specifically include "services for adolescents." Congress further provided that Title X grants and contracts "shall be made in accordance with such regulations as the Secretary may promulgate."

In 1983, HHS promulgated a final rule that sought to implement the statutory directive to encourage family participation by imposing certain parental notification and consent requirements for adolescent services. The rule, among other requirements, directed Title X grantees to notify (with limited exceptions) a parent or guardian within 10 working days of initially prescribing contraceptive services and to comply with any *state* parental notification or consent laws related to the provision of family services. Several plaintiffs—including certain Title X grantees and the state of New York—challenged the final rule. Later that year, both the D.C. Circuit, in *Planned Parenthood Federation of America, Inc. v. Heckler*, and the Second Circuit, in *New York v. Heckler*, ruled in favor of the plaintiffs and enjoined the final rule as exceeding the Secretary's statutory authority.

According to these courts, the text and legislative history of the 1981 amendments unambiguously evince an intent not to *require* family involvement but merely to *encourage* it. Moreover, in the courts' view, in encouraging family participation only "to the extent practical," Congress intended to maintain the long-standing administrative practice of maintaining teenage confidentiality, recognizing that confidentiality was a crucial factor in attracting teenagers to Title X clinics and reducing incidence of teenage pregnancies. This intent to not require parental notification or consent, the Second Circuit also observed, is further buttressed by the fact the Title XX Adolescent Family Life Demonstration Projects—enacted at the same time as Title X's 1981 amendments—expressly imposed parental notification and consent requirements on grantees. In the court's view, that choice demonstrated that "Congress knew how to

require parental notice and consent when that was its intention." As to the requirement to comply with relevant state notification and consent laws, the D.C. Circuit concluded that the requirement improperly delegated to states the authority to establish eligibility requirements for Title X funds.

Relying on these decisions, other courts that later considered whether Title X projects are subject to state laws that require parental consent—including the Tenth Circuit and Eighth Circuit—concluded that such laws conflict with Title X. Consistent with this case law, HHS continued with its policy of maintaining the confidentiality of minors that receive services at Title X projects. In 2021, HHS formally adopted 42 C.F.R. § 59.10(b) through rulemaking proceedings, which prohibits Title X projects from requiring parental consent and notification for services provided to minors.

Before HHS issued the 2021 final rule that includes 42 C.F.R. § 59.10(b), in *Deanda v. Becerra*, a parent sued the agency in the Northern District of Texas, challenging HHS's then-policy of prohibiting Title X projects from requiring parental consent and notification. Part 2 of this Sidebar series provides a summary of the case and the district court's order, as well as certain preliminary observations about the litigation.

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